

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No. 3910/2007**

% Judgment delivered on: 10th March, 2010

Child Guidance Centre Petitioner.
Through: Mr. Mr. Amit Seth, Adv.

versus

Govt. of NCT of Delhi Respondent.
Through: C.B.Singh, Adv.

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

KAILASH GAMBHIR, J. (Oral):

1. By this petition filed under Article 226/227 of the Constitution of India, the petitioner seeks to challenge the impugned award dated 5.5.2005, whereby the Ld. Labour Court has given directions to the petitioner to reinstate the respondent

workman along with grant of 50% back wages.

2. Brief facts relevant for deciding the present petition are as that the respondent no. 2 workman was engaged on daily wages by the petitioner organization on 1.9.1986 and vide order dated 1.4.1991 , his services were terminated. Thereafter, the respondent workman raised an industrial dispute bearing ID No. 49/95 whereby vide order dated 5.5.2005, the Labour Court held that the services of the respondent workman were terminated illegally without complying with the provisions under section 25 F of the I.D. Act and hence was granted reinstatement with 50% back wages. Feeling aggrieved with the same, the petitioner has preferred the present petition.

3. Counsel for the petitioner submits that the petitioner is not an “industry” in terms of Section 2A and 2(s) of the Industrial Disputes Act, 1947 and therefore, the Labour Court had no jurisdiction to try and entertain the reference sent by the Government. Counsel for the petitioner further states that in the written statement filed by the petitioner, the petitioner society took a preliminary objection to the maintainability of the said reference on the ground that the petitioner society is a voluntary

organization and is depending primarily on the grants received from the Government of India on yearly basis. It was also submitted by the petitioner in the said written statement that the petitioner is not conducting any business activity for earning profits and that it was established under Dr. Zakir Hussain Memorial Welfare Society (Regd.) with the objective to give help to the children belonging to poor families and also to disabled children. Counsel further submits that Ms. Fozia Alam, Director of the petitioner society in his evidence clearly deposed about the nature of the said activity being run by the petitioner society. The contention of the counsel for the petitioner is that neither the respondent rebutted the deposition of the said witness and nor was there any rebuttal by the respondent in his rejoinder filed to the written statement and therefore the Ld. Labour Court ought to have believed the stand of the petitioner. In support of his arguments, counsel for the petitioner placed reliance on the judgment of this court in ***Shakuntla Vs. M/s Tamanna Special School, 2006 V AD (DELHI) 396.*** Another contention raised by the counsel for the petitioner is that the respondent was simply discharged from his services although there was enough

material against him showing his misbehavior, misconduct and insubordination, and therefore, in a case like this the Ld. Labour Court instead of directing reinstatement should have awarded some compensation. The contention of the counsel for the petitioner is that keeping in view the conduct of the respondent, it would not be in the interest of the petitioner society to take the respondent back in employment and that too now when there is a gap of about 19 years.

4. Refuting the said submissions of the counsel for the petitioner, counsel for the respondent submits that the petitioner has failed to place on record any documentary evidence to prove the fact that the petitioner is not an “industry”. Counsel placed reliance on the judgment of the Apex Court in ***Bangalore Water Supply & Sewerage Board Vs. A. Rajappa & Ors. (1978) 2 SCC 213***. Counsel further submits that the nature of activity being carried on by the petitioner is a systematic activity, and therefore, the same is squarely covered by the law laid down in the said judgment although the petitioner may not be a profit making body. Counsel for the respondent further submits that the respondent is still out of employment and simply because of

the delay in the legal process he should not be deprived of the fruits of the award passed in his favour.

5. I have heard counsel for the parties at considerable length and gone through the records.

6. Vide impugned award dated 5.5.2005 the Ld. Labour Court gave directions for the reinstatement of the respondent workman along with grant of 50% back wages. The Labour Court based on the material on record found the respondent in employment of the petitioner society since 1988 and that his services were terminated w.e.f. 9.4.1991. It is not in dispute between the parties that the services of the respondent workman were terminated without complying with the provisions of Section 25-F of the I.D. Act. It is further not in dispute that taking the period from the date of his employment, he has completed 240 days of continuous service prior to the date of the said termination letter placed on record. It is also quite manifest that no retrenchment compensation was given to the respondent and also no compensation in lieu of notice was given in compliance with Section 25 F of the I.D. Act. It is also a matter of fact that no domestic enquiry was set up by the petitioner against

the respondent for his alleged acts of misconduct and insubordination, and therefore, no fault can be found with the order of the Ld. Labour Court holding the termination of the respondent as illegal and unjustified. Once the Labour Court has come to the conclusion that the termination of the workman is illegal and unjustified then the normal consequence is to reinstate the workman, although depending on the facts of each case, the Tribunal can also award compensation. It is also a settled legal position that under the I.D. Act prime duty is casted upon the Tribunal to exercise its judicial discretion to give appropriate relief keeping in view the facts of each case and so far the facts of this case are concerned, I do not find any illegality or perversity in the order of the Ld. Labour Court giving directions for the reinstatement of respondent workman with grant of 50% back wages. So far the plea of the petitioner stating that the petitioner in fact is not interested to take the workman back in service after a gap of 19 years, I find the argument of the counsel for the petitioner is devoid of any force.

7. It cannot be lost sight of the fact that the petitioner did not place on record any documentary evidence to prove the fact

of grant of 90% aid from the Government or that it was dependent on the donations. In the judgment of, ***Shakuntla Vs. M/s Tamanna (Supra)*** cited by the Ld. Counsel for the petitioner sufficient evidence was placed and proved on record by the management to show that the funding was primarily through the donations and contributions from people from all walks of life for running the organization. It is a settled legal position that the burden was on the petitioner to prove that it was not an “industry” to claim exemption from the applicability of I.D. Act. It would be pertinent to reproduce the relevant para of the judgment of this court in ***Off-in-charge (CZARI) vs. Pre.Officer & Anr. (W.P. (C) 5016/1997)*** where it was held that:

“Whether the petitioner/management is an ‘industry’ or not, is not a purely legal issue, but a mixed question of fact and law. It was for the petitioner/management to establish as to whether it is an ‘industry’ or not before the Tribunal and for the said purpose, it was required to make not only averments to the said effect in its written statement, but also to support the same with relevant facts pertaining to the nature of the petitioner organization, nature of work being carried out by it etc. so as to claim exemption from being covered under the Act.”

Hence keeping the aforesaid view in mind, in the present case there is no proof placed on record by the management that the money collected from the contributions was not sufficient to run their project so far the facts of the present case are concerned

although the petitioner has pleaded in its written statement that the petitioner is an NGO and is not an “industry” and is also getting 90% of the aid from the Government but no documentary evidence has been placed on record to substantiate the said plea. In the absence of any documentary evidence placed on record no fault can be found in the order of the Ld. Labour Court in accepting the said plea of the petitioner.

8. In reaching its decision, the Ld. Labour Court has placed reliance on the judgment of the Apex Court in ***Bangalore Water supply & Sewerage Board (Supra)***. The landmark judgment lays down the triple test for determining whether a society is an industry or not. It was held that that section 2(j) has a wide import and laid down the triple test as industry is one where there is systematic activity organised by co-operation between employer and employee for production and distribution of goods and services calculated to satisfy human wants and wishes, where absence of motive or gainful employment is irrelevant. The true focus is functional and decisive test is nature of the activity with special emphasis on employer-employee relationship and an organisation does not cease to be trade and

business merely because it is engaged in philanthropic activities. After seeing the material on record, the Labour court came to the conclusion that there is a systematic activity of work being done in the petitioner organization and such an organization would come within the definition of “industry” as envisaged under section 25-F of the I.D. Act.

9. In the light of the aforesaid, I do not find any perversity or illegality in the award.

10. There is no merit in the petition and the same is hereby dismissed.

March 10, 2010
pkv

KAILASH GAMBHIR,J